Supreme Court U.S.
FILED
APR 17 2002
OFFICE OF THE CLERK

2

No. 01-1403

In The

Supreme Court of the United States

THE COUNTY OF BEAVER, PENNSYLVANIA
and BEA SCHULTE, COMMISSIONER,
In her individual capacity,

Petitioners,

v.

DELORES ARMOUR,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SAMUEL J. CORDES
(*Counsel of Record*)
CARRIE L. FURLAN
OGG, CORDES, MURPHY & IGNELZI
245 Fort Pitt Boulevard
Pittsburgh, PA 15222
(412) 471-8500

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Question 1.

Whether this Court will consider an issue raised by Petitioners for the first time when seeking panel rehearing or rehearing *en banc* with the Court of Appeals?

Question 2.

Can the First Amendment inquiry into whether a government employer meets its burden of showing political affiliation is an appropriate requirement for the successful performance of the position at issue be decided as a question of law on a motion for summary judgment when material issues of fact exist concerning the nature of the position?

LIST OF PARTIES

Respondent concurs with Petitioner's List of the Parties.

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

JURISDICTION 1

COUNTERSTATEMENT OF THE CASE 1

A. Petitioners failed to raise the issue raised here with the District Court 2

B. Petitioners failed to raise the issue raised here with the Court of Appeals panel 3

C. Petitioners never raised the issue presented here until they sought panel rehearing or *En Banc* rehearing with the Third Circuit 4

D. Factual issues below precluded summary judgment 4

REASONS WHY THE PETITION SHOULD BE DENIED 6

I. Petitioners failed to raise the issue they raise here with the District Court or the court of appeals panel 6

II. Because the Third Circuit reviewed a summary judgment decision, petitioners' proposed question would not properly have been before that court even if Petitioners did raise it 10

III. No actual conflict exists among the circuit courts on the issue decided by the Third Circuit 13

TABLE OF CONTENTS – Continued

Page

A. Petitioners have not cited any First Circuit cases in which the court resolved factual issues on a Rule 56(c) motion..... 14

B. Petitioners have not cited any Second Circuit cases in which the court resolved factual issues on a Rule 56(c) motion 16

C. Petitioners have not cited any Third Circuit cases in which the court resolved factual issues on a Rule 56(c) motion..... 18

D. Petitioners have not cited any Fourth Circuit cases in which the court resolved factual issues on a Rule 56(c) motion 23

E. Petitioners have not cited any Fifth Circuit cases in which the court resolved factual issues on a Rule 56(c) motion 24

F. Petitioners have not cited any Sixth Circuit cases in which the court resolved factual issues on a Rule 56(c) motion 24

G. Petitioners have not cited any Seventh Circuit cases in which the court resolved factual issues on a rule 56(c) motion..... 26

H. Petitioners have not cited any Eighth Circuit cases in which the court resolved factual issues on a Rule 56(c) motion 27

I. Petitioners have not cited any Ninth Circuit cases in which the court resolved factual issues on a Rule 56(c) motion..... 28

J. Petitioners have not cited any Tenth Circuit cases in which the court resolved factual issues on a Rule 56(c) motion..... 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970)..... 7

Air France v. Saks, 470 U.S. 392 (1985)..... 9

American Surety Co. v. Baldwin, 287 U.S. 156 (1932) 8

Amour v. County of Beaver, PA., 271 F.3d 417 (3d Cir. 2001) 3

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 11

Barker v. City of Del City, 215 F.3d 1134 (10th Cir. 2000)..... 29

Barnes v. Bosley, 745 F.2d 501 (8th Cir. 1984)..... 27

Bauer v. Bosley, 802 F.2d 1058 (8th Cir. 1986) 27

Berkemer v. McCarty, 468 U.S. 420 (1984)..... 7

Boyle v. County of Allegheny Pennsylvania, 139 F.3d 386 (3d Cir. 1998) 21, 22

Branti v. Finkel, 445 U.S. 507 (1980) ..... *passim*

Brown v. Trench, 787 F.2d 167 (3d Cir. 1986) 19, 20

Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986)..... 7

City of Lockhart v. U.S., 460 U.S. 125 (1983)..... 7

Dickeson v. Quarberg, 844 F.2d 1435 (10th Cir. 1988) 29

DiRuzza v. County of Tehama, 206 F.3d 1304 (9th Cir. 2000) 28

Elrod v. Burns, 427 U.S. 347 (1976) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

First Nat. Bank of Ariz. v. Cities Service Co., 391 U.S. 253 (1968) 11

Gibbons v. Bond, 668 F.2d 967 (8th Cir. 1982) 27

Godchaux Co. v. Estopinal, 251 U.S. 179 (1919) 8

Gordon v. County of Rockland, 110 F.3d 886 (2nd Cir. 1997) 16

Groupo de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999) 6

Heckler v. Campbell, 461 U.S. 458 (1983) 7

Hoard v. Sizemore, 198 F.3d 205 (6th Cir. 1999) 25

Hoover v. Ronwin, 466 U.S. 558 (1984) 9

Horton v. Taylor, 767 F.2d 471 (8th Cir. 1985) 27

Jimenez Fuentes v. Torres Gaztambide, 807 F.2d 236 (1st Cir. 1986) 14, 15, 16

Kline v. Hughes, 131 F.3d 708 (7th Cir. 1997) 26

Lawn v. U.S., 335 U.S. 339 (1958) 7

McGurrin Ehrhard v. Connolly, 867 F.2d 92 (1st Cir. 1989) 15, 16, 17

Mumford v. Basinski, 105 F.3d 264 (6th Cir. 1997) 24

Ness v. Marshall, 660 F.2d 517 (3rd Cir. 1981) 18, 19

Ortix-Pinero v. Rivera-Arroyo, 84 F.3d 7 (1st Cir. 1996) 15, 16

Patrick v. Burget, 486 U.S. 94 (1988) 7

TABLE OF AUTHORITIES – Continued

Page

Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206 (1998) 7

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 8, 9

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) 12

Regan v. Boogertman, 984 F.2d 577 (2d Cir. 1993) 17

Rosenthal v. Rizzo, 555 F.2d 390 (3d Cir. 1977) 19

Simmerman v. Nebraska, 116 U.S. 54 (1885) 8

Sisson v. Ruby, 497 U.S. 358 (1990) 7

Solorio v. U.S., 483 U.S. 435 (1987) 7

Sowards v. Loudon County, Tennessee, 203 F.3d 426 (6th Cir. 2000) 25

Stegmaier v. Trammel, 597 F.2d 1027 (5th Cir. 1979) 24

Stott v. Haworth, 916 F.2d 134 (4th Cir. 1990) 23

Vezzetti v. Pelligrini, 22 F.3d 483 (2d Cir. 1994) 17

Waskovich v. Morgano, 3 F.3d 1292 (3d Cir. 1993) 20

Wetzel v. Tucker, 129 F.3d 380 (3d Cir. 1998) 21, 22

Wills v. Texas, 511 U.S. 1097 (1994) 7, 8

Wisconsin v. Mitchell, 508 U.S. 476 (1993) 7

Zold v. Township of Mantua, 935 F.2d 633 (3d Cir. 1991) 20

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

28 U.S.C. §1257 1

28 U.S.C. §2101 1

42 U.S.C. §1983 1

CONSTITUTIONAL AMENDMENTS

First Amendment 1, 5, 6

Rules of Court 1

Fed.R.Civ.P. 56 ..... *passim*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, Delores Armour (hereafter "Armour") respectfully requests this Court deny the petition for Writ of *Certiorari*, seeking review of the judgment and opinion of the United States Court of Appeals for the Third Circuit in this case. That opinion is reported at 271 F.3d 417 (3d Cir. 2001).

JURISDICTION

Respondent agrees the Petition for Writ of Certiorari was sought within 90 days of the judgment of the Court of Appeals and therefore is timely pursuant to 28 U.S.C. §1257 and §2101(c) and this Court's Rule 13(1).

COUNTERSTATEMENT OF THE CASE

This is a First Amendment political affiliation discharge action brought under 42 U.S.C. §1983. Delores Armour, Plaintiff below, Appellant in the Court of Appeals, and Respondent here, alleges she was fired from her position as secretary to Beaver County Pennsylvania Commissioner Bea Schulte because of her political affiliation. Beaver County and Schulte (hereafter "Beaver County" or "Petitioners") were the defendants below, appellees in the Court of Appeals, and Petitioners here.

A. Petitioners Failed to Raise The Issue Raised Here With the District Court.

Petitioners moved for summary judgment, claiming no material issue of fact existed on the duties of Armour's position and therefore they were entitled to judgment as a matter of law because political affiliation is an appropriate requirement for the position of commissioner's secretary.

In the district court, Petitioners did not contend the issue on a summary judgment record was a question of law or fact. Rather, Petitioners argued no factual issues existed concerning the nature of Armour's position and therefore, the district court could decide the issue as a matter of law. See (Brief in Support of Motion for Summary Judgment) [Doc. No. 11] at 2 (arguing standard of review was whether genuine issue of material facts exist); *Id.*, at 9, (given the specific facts of record, the secretarial position occupied by Armour is a confidential position for which political affiliation is a factor), (Reply to Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment) [Doc. No. 16] at 9-11 (arguing no factual dispute exists that would preclude summary judgment on issue of whether defendant met its burden).

The district court granted Defendants' motion finding no factual issues existed on the nature of Armour's position and Beaver County *therefore* was entitled to judgment as a matter of law, pursuant to Fed.R.Civ.P. 56(c).

In finding Armour's party affiliation was an appropriate job requirement, the district court relied primarily on three factors: Armour acted as a liaison between

Schulte and department heads, which requires knowledge of confidential matters; Armour responded to constituent calls and handled the matter before involving Schulte; and Armour had access to correspondence containing party issues and confidential material. In accepting each of these facts, the district court disregarded or rejected Armour's testimony or parts of other witnesses' testimony that contradicted those factual assertions. However, neither the district court, nor even Petitioners, dispute that the question on a summary judgment record was whether material issues of fact existed.

B. Petitioners Failed to Raise The Issue Raised Here With the Court of Appeals Panel.

On appeal, Beaver County again failed to argue that the question of whether Armour could be discharged because of her political affiliation was an issue of law or even that factual issues are determined by the court. Rather, Beaver County acknowledged that on appeal from the grant of summary judgment the court "must review the evidence in [a] light most favorable to the non-moving party and determine whether or not there is sufficient evidence *from which a jury reasonably could find liability.*" (Appellee's Brief in *Armour v. The County of Beaver,* No. 00-3431 at pg. 7) (emphasis added); *Id.*, at 13 ("in determining whether political affiliation is a legitimate factor to be considered for a particular job, the inquiry is inherently fact-specific . . . ").

The Third Circuit reversed the district court's grant of summary judgment, holding the district court failed to view the facts in a light most favorable to Armour, as the non-moving party. The court identified several disputed

facts concerning the nature of Armour's position that could lead a reasonable fact finder to determine Beaver County had not met its burden of proving political affiliation was an appropriate requirement for the successful performance of the job.

C. Petitioners Never Raised The Issue Presented Here Until They Sought Panel Rehearing or *En Banc* Rehearing with the Third Circuit.

Not until it petitioned for Panel Rehearing or *En Banc* Rehearing in the Third Circuit, did Beaver County raise the issue it now raises in its Petition for Writ of Certiorari.

D. Factual Issues Below Precluded Summary Judgment.

In 1995, Schulte ran for Beaver County Commissioner. (R. 51).[1] After Schulte won the election, she offered Armour a position as her secretary. (R. 66). Armour, along with the other two commissioners' secretaries, performed "normal secretarial duties." (R. 67). Although each commissioner was entitled to appoint his or her own secretary, the three shared the same office space (R. 83), and operated as a "general pool," with each secretary, depending on availability, performing routine tasks for any one of the commissioners, as well as the Chief Clerk. (R. 44). For example, if Armour was not at her desk another one of the three secretaries would

---

[1] References to the record are noted as "(R. ___)."

answer her phone line and vice versa. (R. 44). The secretaries spent fifty to sixty percent of their time working for the chief clerk. (R. 85, 90).

The three secretaries spent the bulk of their time performing such clerical tasks as typing and copying correspondence, resolutions, and motions (R. 67, 44); answering phones (R. 53); greeting and directing visitors to the office (R. 89); handling paperwork (R. 53); opening mail (R. 67); making photocopies (R. 53); making travel arrangements and scheduling meetings (R. 82); filing documents (R. 67); directing checks to the proper departments (R. 53); and obtaining signatures (R. 44).

In addition to these standard duties, one of the Commissioner's secretaries helped the Chief Clerk with financial tasks, such as paying invoices, and was responsible for taking minutes at public board meetings. (R. 82).

Petitioners below pointed to their witness' description of the job duties. Respondent contended there were factual issues concerning the nature of the position, which could not be resolved on a summary judgment record, especially where, as here, the burden of showing a permissible infringement of First Amendment rights rested with the defendant.

In short the factual issue below was whether Armour's position was simply highly clerical support for the Chief Clerk and a County Commissioner, or whether it was more akin to an administrative assistant. The district court found no factual dispute over the nature of the position. The Third Circuit held otherwise.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

PETITIONERS FAILED TO RAISE THE ISSUE WITH THE DISTRICT COURT OR THE COURT OF APPEALS PANEL.

In the district court, Petitioners did not argue the court, pursuant to the responsibilities imposed on it by the Constitution, was required to resolve the disputed issues of fact as to what Armour's position entailed and to determine whether that position was entitled to First Amendment protection. Quite the contrary, Petitioners moved for summary judgment pursuant to Rule 56(c), claiming *no* disputes of material fact existed and they were entitled to judgment as a matter of law.

Before the Third Circuit Armour argued the district court improperly made credibility determinations and resolved issues of fact on a Rule 56(c) motion. Petitioners did not there raise the issue they now petition for review. Petitioners again maintained there were no disputes of material fact and the district court properly entered judgment in their favor as a matter of law.

Petitioners raised the question of whether the inquiry under *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980) is one of fact or law for the first time in their petition to the Third Circuit for rehearing *en banc*. Petitioners raised their argument too late. Petitioners have waived the issue.

This Court consistently has refused to consider issues not raised in the lower courts. *See, e.g., Groupo de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 n. 3 (1999) (declining to consider an argument neither raised

nor considered below), *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998), quoting *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."), *Wisconsin v. Mitchell*, 508 U.S. 476, 481 n. 2 (1993) (refusing to reach claims not developed below), *Sisson v. Ruby*, 497 U.S. 358, 359 n. 1 (1990) (declining to consider an argument not raised before the lower courts), *Patrick v. Burget*, 486 U.S. 94, 99 n. 5 (1988) ("This Court usually will decline to consider questions presented in a petition for writ of certiorari that have not been considered by the lower court."), *Solorio v. U.S.*, 483 U.S. 435, 451 n. 18 (1987) (declining to consider an argument not raised in the lower court), *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 114 n. 9 (1986) (refusing to consider a claim not raised below), *Berkemer v. McCarty*, 468 U.S. 420, 443 (1984) (refusing to address issue not raised before the district court or the court of appeals), *Heckler v. Campbell*, 461 U.S. 458, 468 n. 12 (1983) (declining to consider arguments not raised before the court of appeals), *City of Lockhart v. U.S.*, 460 U.S. 125, 133 n. 9 (1983) (declining to review in the first instance an issue not decided by the district court), *Lawn v. U.S.*, 355 U.S. 339, 362 n. 16 (1958) (refusing to review a question not presented to the Court of Appeals).

In *Wills v. Texas*, 511 U.S. 1097 (1994), this Court denied the petition for writ of certiorari for this reason. Justice O'Connor, in her concurring opinion, agreed with the dissent that while the petitioner may have had a very strong claim the petition should have been denied because, "[i]t has been the traditional practice of this Court, however, to decline to review claims raised for the

first time on rehearing in the court below." *Id.* As Justice O'Connor noted, following that practice in that case was appropriate "because we do not have the benefit of a decision analyzing the application of [the law] to the facts of petitioner's case." *Id.*

Wills' reasoning should also be applied to this case. Because Petitioners did not raise their question before the district court or the panel of the Third Circuit, this Court does not have the benefit of any opinion on whether a jury must decide if Armour's position entitled her to First Amendment protection or whether the issue is one of law for the court to determine. The district court granted Petitioners' summary judgment motion, finding there were no facts in dispute. The Third Circuit reversed, holding disputed facts must be resolved by the fact-finder before the question of whether Armour was entitled to protection under *Elrod-Branti* could be addressed. The issue before both lower courts was whether material facts were in dispute, not whether the *Elrod-Branti* inquiry is for the judge or jury. Thus, this Court does not have the benefit of any lower court decision on the issue Petitioners now raise.

In her concurring opinion in *Wills*, Justice O'Connor relied upon *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945). In that case, the petitioners first raised their claim that the Nebraska Supreme Court lacked jurisdiction in motions to dismiss and for rehearing. This Court refused to entertain the question, stating "[q]uestions first presented to the highest State court on a petition for rehearing come too late for consideration here." *Id., citing Simmerman v. Nebraska*, 116 U.S. 54 (1885), *Godchaux Co. v. Estopinal*, 251 U.S. 179 (1919); *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932).

Although *Radio Station WOW* and the cases upon which it relied involve review of state court decisions rather than those of federal circuit courts, the reasoning applies equally in the latter context. Because neither of the lower courts were faced with the question Petitioners seek to raise before this Court, this Court, were it to grant the petition for certiorari, would not be reviewing any claimed error of a lower court, but would be deciding the issue in the first instance. That is not the function of this Court. Petitioners raised their question too late for consideration by this Court.

Likewise, this Court has held it will not hear arguments raised for the first time on a petition for rehearing in the court below. In *Hoover v. Ronwin*, 466 U.S. 558 (1984), the respondent claimed before this Court that Arizona's practice of limiting bar admissions violated the Fifth and Fourteenth Amendments. *Id.* at 574 n. 25. This Court refused to address the issue, made for the first time in response to the petitioner's motion for rehearing *en banc* before the Ninth Circuit. Raising the question for the first time in petitioning for *en banc* review is a "failure to [do so] in a timely manner [and] precludes [this Court's] consideration." *Id.*

Similarly, in *Air France v. Saks*, 470 U.S. 392 (1985), this Court was presented with an issue not raised before the circuit court. This Court refused to consider the issue, stating "[w]e leave the disposition of this claim to the Court of Appeals in the first instance." *Id.* at 408, citing *Hoover, supra.*

Again, Petitioners raised the question of which they now seek review for the first time in their petition for rehearing *en banc*. It was not raised or decided by the

district court or the Third Circuit panel. This Court should decline to consider this question in the first instance. Petitioners' failure to raise this argument precludes this Court's consideration of the issue.

Because this Court consistently has refused to decide in the first instance questions that were not raised or decided in the lower courts, the Petition for Writ of Certiorari should be denied.

II.

BECAUSE THE THIRD CIRCUIT REVIEWED A SUMMARY JUDGMENT DECISION, PETITIONERS' PROPOSED QUESTION WOULD NOT PROPERLY HAVE BEEN BEFORE THAT COURT EVEN IF PETITIONERS DID RAISE IT.

In the district court, Petitioners moved for summary judgment, arguing, as any party making a Rule 56(c) motion must do, that there were no material issues of fact in dispute and they were entitled to judgment as a matter of law. The district court agreed and granted Petitioners' motion. Armour appealed this decision to the Third Circuit Court of Appeals, arguing, *inter alia*, that the district court erroneously applied the summary judgment standard by making credibility determinations and resolving factual issues. The Third Circuit agreed with Armour, holding that "there are material issues of fact for the fact-finder," and remanded the case to the district court. What is readily apparent from this synopsis is that the issue of whether the *Elrod-Branti* determination is one of law or an issue of fact for the fact-finder was never before the Third Circuit. Nor did that court even *sua sponte* decide the issue. All the Third Circuit determined was that there

were material facts in dispute rendering summary judgment inappropriate at this stage of the case. The Third Circuit held only that the district court misapplied the standard for summary judgment.

Therefore, this case, at the district court level and before the Third Circuit, solely concerned the standard a district court must apply in deciding a motion for summary judgment pursuant to Rule 56(c), specifically whether such a motion may be granted if there are material facts in dispute and whether a trial court may make credibility determinations in ruling on a Rule 56(c) motion. From both the text of the Rule and the decisions of this Court, it is apparent that one cannot.

Rule 56(c) provides that a motion of summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), this Court clarified what Rule 56(c) requires. There, this Court explained that a factual dispute is "genuine" if the evidence is such that a reasonable fact-finder could return a verdict for the nonmoving party. *Id.* at 248. A fact is "material" if it might affect the outcome of the case. *Id.* A motion for summary judgment must be denied if "sufficient evidence supporting the claimed factual dispute [is] shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Id.* at 249, *quoting First Nat. Bank of Ariz. v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968). If there is a genuine issue of material fact, summary judgment must be denied; the trial judge is

not permitted to make credibility determinations or resolve the dispute: "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id. See also, Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151 (2000).

Rather than diverging from this Court's precedent, as Petitioners suggest, the Third Circuit strictly obeyed it. Because it found that the record showed genuine issues of material fact, and that the trial court improperly weighed the evidence and made credibility determinations, the Third Circuit reversed the trial court's grant of summary judgment.

Petitioners do not claim the Third Circuit erred in finding there are issues of material fact in dispute. Nor do they complain that the Third Circuit improperly found the dispute is genuine. Nor do they argue that, contrary to the Third Circuit's holding, the trial court refrained from weighing the evidence. In their question presented, Petitioners do not ask this Court to review any decision the Third Circuit actually made.

Petitioners ask this Court to review whether the *Elrod-Branti* inquiry is a question of law for the court or a question of fact for the jury. Petitioners totally ignore the procedural posture of this case. Regardless of who decides that ultimate issue, that determination cannot be made pursuant to a Rule 56(c) motion if there are material factual disputes about what the government position entailed. That is what the Third Circuit held. Petitioners have not challenged that holding.

The Third Circuit's decision was based on the requirements of Rule 56(c), not on any alleged Third Circuit precedent that the determination of whether political affiliation is an appropriate requirement for a position is a question of fact for the jury. That issue was simply not before that court.

The Third Circuit merely held that genuine issues of material fact precluded an entry of judgment pursuant to Rule 56(c). After these disputes are resolved by the finder of fact, be it the jury or the judge, then and only then will a court be faced with Petitioners' question. This case is simply not ripe for Petitioners' question to be answered. As such, the Petition for Writ of Certiorari should be denied.

III.

NO ACTUAL CONFLICT EXISTS AMONG THE CIRCUIT COURTS ON THE ISSUE DECIDED BY THE THIRD CIRCUIT.

Although they waived the argument by never putting it before either the district court or the Third Circuit panel, Petitioners expound at great length about First Amendment law in general, and a fabricated split among the circuit courts over whether the *Elrod-Branti* inquiry is one of fact or law. However, no actual conflict exists in the procedural posture of this case.

To demonstrate their supposed split among the circuits, Petitioners point to cases where the courts upheld grants of summary judgment in *Elrod-Branti* factual situations because no factual dispute existed. They cite others where the courts held summary judgment was improper because factual issues existed over the nature of the jobs

at issue. In yet others, no summary judgment issue was even before the court.

Petitioners have simply overlooked why these various courts held summary judgment was or was not appropriate in *Elrod-Branti* cases. It has nothing at all to do with the fact that they are *Elrod-Branti* cases, and everything to do with the requirements of Rule 56(c). At bottom, the cases Petitioners cite support a single, and rather unremarkable, proposition: when no genuine issue of material fact exists, summary judgment may be granted; when there are material facts in dispute, summary judgment may not be granted. This is true for all summary judgment motions, regardless of the substantive law that applies to the case.

In short, no split actually exists. Petitioners have not pointed to a single case in which the circuit court found there was no genuine issue of material fact but yet refused to decide the matter as a matter of law. Nor have petitioners cited any cases in which the court found there was a genuine issue of material fact but granted summary judgment anyway.

A. Petitioners Have Not Cited Any First Circuit Cases In Which The Court Resolved Factual Issues On A Rule 56(c) Motion.

Petitioners cite *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236 (1st Cir. 1986) (P. 18),[2] for the proposition that the First Circuit maintains that the *Elrod-Branti* question is one of law. In that case the First Circuit, *en banc*,

---

[2] References to Petitioners' Petition for Writ of Certiorari noted as "(P. ___)."

was reviewing the issuance of a preliminary injunction. In the context of a preliminary injunction hearing, the court is required to weigh the evidence to determine the likelihood of success on the merits. This court's function in this context is totally unlike its function when deciding a Rule 56(c) motion, where the court is prohibited from weighing the evidence. *Jimenez Fuentes* is completely irrelevant to the case at hand.

In *McGurrin Ehrhard v. Connolly*, 867 F.2d 92 (1st Cir. 1989), the district court, after the plaintiff had the opportunity to present her evidence at trial, entered a directed verdict in favor of the defendant. On appeal, the plaintiff argued that her actual duties involved limited decision-making. In response, the First Circuit stated, "[w]e agree that a jury might find that her 'particular responsibilities' as director of SOS West did not involve final policymaking authority. They did, however, involve 'input' into hiring decisions, supervision of employees, and development of office policies and practices." *Id.* at 95.

The First Circuit, based on the undisputed facts of the powers of the position, affirmed the trial court, finding the position was one for which political affiliation was an appropriate requirement. This decision hinged on the First Circuit's view that the inherent powers of a position, rather than the actual function performed, determine the *Elrod-Branti* question.

In *Ortix-Pinero v. Rivera-Arroyo*, 84 F.3d 7 (1st Cir. 1996), the district court granted the defendants' motion for summary judgment. On appeal, the First Circuit noted that no factual dispute sufficient to thwart summary judgment can be created by "conclusory allegations, improbable inferences, and unsupported speculation." *Id.*

at 10 (citation omitted). The plaintiff attempted to do just that, arguing merely that the position was not a "political" position based on the duties he actually performed. *Id.* at 17. The First Circuit, following precedent that the inherent powers of a position, rather than the actual duties performed by the employee, were relevant for the *Elrod-Branti* question, affirmed the district court because there was no genuine issue of material fact with regard to the inherent powers of the position. *Id.* Again, *Ortix-Pinero* is readily distinguishable from the instant case.

Petitioners have not pointed to any First Circuit precedent that would have mandated a decision different from the Third Circuit's decision in this case. *Jimenez Fuentes* involved a hearing for a preliminary injunction; *McGurrin Ehrhard* was decided on a motion for a directed verdict after the plaintiff had the opportunity to present her evidence at trial; and *Ortix-Pinero* was decided on summary judgment when the inherent powers of the position were undisputed. None of these mirror the posture of the instant case.

B. Petitioners Have Not Cited Any Second Circuit Cases In Which The Court Resolved Factual Issues For A Rule 56(c) Motion.

Petitioners cite several Second Circuit cases they claim demonstrate that circuit's acknowledgment of a difference between a fact-specific inquiry and a question of fact. (P. 18). In *Gordon v. County of Rockland*, 110 F.3d 886 (2nd Cir. 1997), the trial court sent to the jury the question whether the plaintiffs were terminated in violation of the Constitution. The Second Circuit reversed, finding as a matter of law that the plaintiffs' positions

were not protected by *Elrod-Branti*. As in *McGurrin Ehrhard, supra*, this decision was rendered after the plaintiffs had the opportunity to present their evidence at trial, not on a Rule 56(c) motion.

In *Vezzetti v. Pellegrini*, 22 F.3d 483 (2nd Cir. 1994), the district court entered summary judgment against two of the plaintiffs, Vezzetti and Stuart, and denied summary judgment against a third plaintiff Griffith, whose case proceeded to trial and resulted in a defense verdict. The first two plaintiffs appealed. The Second Circuit, based on undisputed facts, affirmed the judgment against *Vezzetti*, finding as a matter of law that he held a job for which political affiliation was a valid consideration. *Id.* at 486. The court reversed as to Stuart because the defendants conceded he did not hold a policymaking position and there were disputed facts regarding whether Stuart's termination was motivated by politics. *Id.* Thus, there were three different results for the three plaintiffs: based on undisputed facts, the court ruled as a matter of law under Rule 56(c) as to *Vezzetti*; based on an admission that Stuart was not a policymaking employee and a factual dispute regarding causation, the summary judgment grant was reversed as to Stuart; and, although not before the Second Circuit, Griffith was allowed to proceed to trial on his *Elrod-Branti* claim. What *Vezzetti* demonstrates is the unremarkable proposition that summary judgment is appropriate in an *Elrod-Branti* case when there is no factual dispute or an admission that the position is non-policymaking. Otherwise, summary judgment is inappropriate.

In *Regan v. Boogertman*, 984 F.2d 577 (2nd Cir. 1993), the trial court granted defendants' motion for summary

judgment. The Second Circuit affirmed, finding as a matter of law, "[s]ince there is no dispute as to any material fact in this litigation," *Id.* at 579, the plaintiff's position was one for which political loyalty was essential. *Id.* at 581. Again, when there is no genuine issue of material fact, a court can rule on a Rule 56(c) motion.

By failing to discuss the procedural posture of any of these Second Circuit cases, Petitioners attempt to convince this Court that the Second Circuit would have decided this case differently. The above analysis clearly demonstrates that, given the facts and procedural posture of this case, the Second Circuit would have made the same decision as the Third Circuit. The Second Circuit like every other one, also recognizes the rather unremarkable proposition that factual disputes cannot be resolved on summary judgment.

C. Petitioners Have Not Cited Any Third Circuit Cases In Which The Court Resolved Factual Issues On A Rule 56(c) Motion.

Petitioners claim the caselaw in the Third Circuit is "a morass of contradictory and incomprehensible opinions." (P. 20). If Petitioners took the time to examine these cases, they would see the different outcomes of these cases result from the application of a consistent legal standard to the unique facts of each case.

In *Ness v. Marshall*, 660 F.2d 517 (3d Cir. 1981), the trial court, finding no factual dispute, granted summary judgment in favor of the defendants. Rather than avoiding the question of whether the *Elrod-Branti* inquiry is for the court or jury, that court clearly stated "it is left to the courts to decide in any particular case whether 'party

affiliation is an appropriate requirement for the effective performance of the public office involved.' " *Id.* at 520. The Third Circuit affirmed, finding as a matter of law that plaintiffs were not entitled to protection under *Elrod-Branti*. The court based its decision on the powers of the plaintiffs' positions as city solicitors as set forth in the York Administrative Code. The plaintiffs argued, based on *Rosenthal v. Rizzo*, 555 F.2d 390 (3d Cir. 1977), that they should have an opportunity to contest the factual issues of what their positions entailed. 660 F.2d at 521. The *Ness* court distinguished *Rosenthal*, noting that in *Rosenthal*, the nature and duties of the plaintiff's position were in dispute, while in *Ness*, the duties of the plaintiffs were set by administrative code and the functions of these duties were undisputed. The *Ness* court explained: "it was improper for the district court to weigh the evidence and rule against Rosenthal on this issue on a Rule 56 motion. . . . This court was criticizing, in particular, the district court's approach of apparently weighing the evidence to make a factual finding in the context of a summary judgment motion." *Id.* at 522 (citations omitted).

Petitioners claim the Third Circuit departed from this precedent in *Brown v. Trench*, 787 F.2d 167 (3d Cir. 1986). There, the district court, finding the plaintiff's position was not protected by *Elrod-Branti*, entered judgment in favor of the defendant and dismissed the case. It is unclear what procedural mechanism the district court utilized; neither that court nor the Third Circuit specify. The Third Circuit affirmed the trial court as to the First Amendment claim, finding plaintiff's position was one for which political affiliation was an appropriate requirement based on the undisputed fact that the plaintiff was responsible for writing press releases. *Id.* at 170. Rather

than making any credibility determinations like the trial court did in this case, *Brown* determined as a matter of law that this one undisputed fact was sufficient to demonstrate the plaintiff was not protected by *Elrod-Branti*.

In *Zold v. Township of Mantua*, 935 F.2d 633 (3d Cir. 1991), all of the parties moved for summary judgment in the district court, and the court granted defendants' motion, finding plaintiff held a confidential position. *Id.* at 635. The Third Circuit noted: "[b]oth parties agree that the relevant facts are undisputed. The parties dispute only how the nature of the job should be characterized. Thus, this court is in a position to apply the relevant legal principles to those facts." *Id.* at 636. The court went on to reverse the trial court, finding the defendants failed to meet their burden of proving political affiliation was an appropriate requirement for plaintiff's position. Petitioners are correct: the court did not remand the case for the fact-finder to determine the constitutional issue; it was able to resolve that issue *itself* because there was no factual dispute. Petitioners fail to realize that in the instant case, the Third Circuit did not remand the case for the fact-finder to *determine* the constitutional issue; rather the court remanded the case for the fact-finder to *resolve* the factual dispute.

In *Waskovich v. Morgano*, 3 F.3d 1292 (3d Cir. 1993), the trial judge granted the defendants' motion for summary judgment after holding an evidentiary hearing. The Third Circuit expressed concern about the procedure utilized by the trial court:

> [I]n certain circumstances a district court may hold an evidentiary hearing at which it receives oral testimony, documents, and other evidence relating to a pending summary judgment

> motion, but it may not rely on the material submitted at such a hearing as a means of resolving any genuine issues of material fact. Nor, of course, may it weigh the evidence submitted, judge the credibility of the witnesses who testified, or use the information it receives as a basis for making findings of fact, as all of these activities are incompatible with summary disposition of the case.

Id. at 1296. However, because the trial court held the evidentiary hearing only to determine whether there was a factual dispute and did not weigh the evidence to resolve factual issues, the Third Circuit affirmed.

Petitioners claim the "culmination of confusion created by the Third Circuit" was reached with the decisions in *Wetzel v. Tucker*, 139 F.3d 380 (3d Cir. 1998) and *Boyle v. County of Allegheny, Pennsylvania*, 139 F.3d 386 (3d Cir. 1998).

In *Wetzel*, the trial court granted defendants' motion for summary judgment, finding that the plaintiff's position was not protected by *Elrod-Branti*. 139 F.3d at 383. The Third Circuit affirmed, finding "there is no genuine issue of material fact as to whether political party affiliation is an appropriate criterion for the effective job performance of the Authority's Solicitor. Rather, as a matter of law, political affiliation is an appropriate criterion for the position." *Id.* at 386.

In *Boyle*, the trial court granted the defendants' motion for summary judgment. The Third Circuit reversed, explaining: "had the district court been sitting as the finder of fact, we would have little trouble in

affirming its decision. However, at the summary judgment stage, the district court improperly weighed conflicting evidence in granting the defendants' motion." *Id.* at 392.

The confusion lies not in the Third Circuit's decisions in these two cases, but in Petitioners' inability to comprehend the requirements of Rule 56(c). In *Wetzel*, there was not a genuine issue of material fact; in *Boyle*, there was. In *Boyle* the majority of the hiring authority testified that political affiliation was not an appropriate requirement for the successful performance of the position. In *Wetzel*, only one of the three commissioners so testified. The hiring authority did not concede the issue upon which it shouldered the burden of proof. Therefore, the *Wetzel* court was able to determine the *Elrod-Branti* question on summary judgment, while the *Boyle* court was not. There is nothing confusing about this. Because the Third Circuit in this case found it was in the same posture as *Boyle* rather than that of *Wetzel*, the court reversed the trial court and remanded the case for the fact-finder to resolve the factual dispute before the *Elrod-Branti* question can be answered.

Rather than constituting "a labyrinth of decisions that remain unreconciled," the Third Circuit precedent on the issue at hand is crystal clear: when there is no factual issue, a court can grant summary judgment; when there are facts in dispute, summary judgment is improper. A district court simply cannot resolve factual disputes in the context of a Rule 56(c) motion.

D. Petitioners Have Not Cited Any Fourth Circuit Cases In Which The Court Resolved Factual Issues On A Rule 56(c) Motion.

Petitioners cite *Stott v. Haworth*, 916 F.2d 134 (4th Cir. 1990) as evidence the Fourth Circuit would have decided this case differently. (P. 19). The trial court, dealing with a class of more than 100 employees, granted the defendants' summary judgment motions as to 55 class members, but denied summary judgment as to 63, finding that 46 of these were absolutely protected by *Elrod-Branti*. *Id.* at 137. The Fourth Circuit remanded ordering the class be decertified and each individual plaintiff be allowed to proceed with his or her claim individually. *Id.* at 139. The court stated that the *Elrod-Branti* inquiry was a question of law to be decided by the court, *Id.* at 143, but also noted the facts of the case were in dispute. *Id.* at 138. Therefore, the court vacated all of the orders entered by the district court, stating "because of the factual nature of the inquiry necessary for resolution of these individual cases, trial by jury is warranted." *Id.* at 146.

What this Fourth Circuit case demonstrates, and what Petitioners fail to comprehend, is that just because a particular issue is a question of law, that does not mandate that the issue be resolved on summary judgment. The Fourth Circuit in *Stott*, just as the Third Circuit in the instant case, adhered to the requirements of Rule 56(c) and held that summary judgment cannot be granted if there are material facts in dispute. Proceeding to trial and allowing the court to decide the *Elrod-Branti* question are not mutually exclusive propositions.

E. Petitioners Have Not Cited Any Fifth Circuit Cases In Which The Court Resolved Factual Issues On A Rule 56(c) Motion.

Petitioners point to *Stegmaier v. Trammel*, 597 F.2d 1027 (5th Cir. 1979), claiming the Fifth Circuit ignores *Elrod's* holding that whether a position is protected involves a question of constitutional interpretation for the court. (P. 16-17, 27). In *Stegmaier*, the district court, based on the complaint, answer, and the defendant's affidavit in support of his motion for summary judgment, decided the Plaintiff's position was a policymaking position, and thus the dismissal did not violate the Constitution. 597 F.2d at 1031. The Fifth Circuit affirmed the trial court's decision, finding the plaintiff was a confidential employee. *Id.* at 1040. The court decided the issue as a matter of law because the duties of the plaintiff's position were clearly defined by statute; the duties and responsibilities of the position were not in dispute.

Petitioners' citation of *Stegmaier* for the proposition that the Fifth Circuit believes the *Elrod-Branti* decision is for the jury rather than the court is simply baffling: That case never went to a jury. It was decided by the court as a matter of law.

F. Petitioners Have Not Cited Any Sixth Circuit Cases In Which The Court Resolved Factual Issues On A Rule 56(c) Motion.

In *Mumford v. Basinski*, 105 F.3d 264 (6th Cir. 1997), the trial court dismissed the plaintiff's claim as moot. As an alternative ground for affirming this decision, the Sixth Circuit found, based on the inherent duties of a

Domestic Relations Court Referee as found in the Ohio Rules of Civil Procedure, that position was not protected by *Elrod-Branti*. The duties were not in dispute.

In *Hoard v. Sizemore*, 198 F.3d 205 (6th Cir. 1999), on reviewing the trial court's various rulings on several summary judgment motions, the Sixth Circuit stated, "[a]lthough the parties give a different spin on the evidence, the underlying facts – what the duties of the jobs are as seen by the plaintiffs and by Sizemore – are not disputed." *Id.* at 212. As such, the court was able to rule on the legal issue of whether the plaintiffs' positions were protected by the First Amendment.

In *Sowards v. Loudon County, Tennessee*, 203 F.3d 426 (6th Cir. 2000), the district court granted the defendants' motion for summary judgment, finding there was not a genuine issue of material fact to show the plaintiff's protected activity substantially motivated her termination. *Id.* at 429-30. On appeal, the Sixth Circuit stated, "Whether political affiliation is an appropriate consideration for a government position is a question of law. The 'issue on summary judgment is whether defendants have established that no genuine factual issue over whether political affiliation may appropriately be considered with respect to the position in question.' " *Id.* at 435 (citations omitted). As the plaintiff's duties were set by statute, there was no factual dispute regarding the powers of her position. Therefore, the court was able to determine as a matter of law that the plaintiff's position was protected by the First Amendment. *Id.* at 438.

Thus the Sixth Circuit, like all of the others, holds that an *Elrod-Branti* case can be disposed of on summary

judgment if the duties and powers of the plaintiff's position are not in dispute. If there is a genuine issue of material fact, summary judgment is inappropriate.

G. Petitioners Have Not Cited Any Seventh Circuit Cases In Which The Court Resolved Factual Issues On A Rule 56(c) Motion.

In *Kline v. Hughes*, 131 F.3d 708 (7th Cir. 1997), both the plaintiff and defendant filed motions for summary judgment in the district court, each alleging there was no dispute of material fact and thus each was entitled to judgment as a matter of law. *Id.* at 709. The district court granted the defendant's motion. The Seventh Circuit affirmed, finding the powers of the plaintiff's position, which were set by statute and not in dispute, allowed the plaintiff meaningful input into governmental decision-making, thus the position was unprotected by *Elrod-Branti*. *Id.* at 710. Presented with a Rule 56(c) motion and no factual dispute, the court ruled as a matter of law. There was no reason for the court to distinguish "a question of law" from "judgment as a matter of law;" the court decided the issue before it.

In discussing *Kline*, petitioners complain "[w]hile the application of *Elrod-Branti* was decided by the court, the decision was based upon the summary judgment standard." (P. 27). What else is a court supposed to do when deciding a Rule 56(c) motion? When a court is ruling on a summary judgment motion, the court must apply the summary judgment standard.

H. Petitioners Have Not Cited Any Eighth Circuit Cases In Which The Court Resolved Factual Issues On A Rule 56(c) Motion.

Petitioners correctly note the Eighth Circuit maintains the *Elrod-Branti* inquiry is a question of law for the court. (P. 19). However, the Eighth Circuit does not suggest the court may decide the issue on summary judgment if there are material facts in dispute.

In both *Gibbons v. Bond*, 668 F.2d 967 (8th Cir. 1982), and *Barnes v. Bosley*, 745 F.2d 501 (8th Cir. 1984), the district courts, after a bench trial, weighed the evidence and determined as a matter of law whether the plaintiffs' positions were protected by the First Amendment. In neither case did the court weigh evidence to decide a summary judgment motion.

In *Horton v. Taylor*, 767 F.2d 471 (8th Cir. 1985), after a bench trial, the trial court entered judgment in favor of the defendant, finding the plaintiffs were not protected by *Elrod-Branti*. *Id.* at 473. The Eighth Circuit reversed the trial court, there was "insufficient evidence to raise an issue for the trier of fact," *Id.* at 478, and determined as a matter of law that the plaintiffs were protected by the First Amendment. *Id.* The issue was decided by both courts after all of the evidence was presented at trial; neither court resolved factual issues on summary judgment.

In *Bauer v. Bosley*, 802 F.2d 1058 (8th Cir. 1986), the trial court sent the *Elrod-Branti* question to the jury. The Eighth Circuit held the trial court erred in doing so, and itself decided the issue as a matter of law based on the complete record of evidence submitted at trial. The court

was not deciding a summary judgment motion, but was reviewing the trial court's order, entered upon the jury verdict, that the plaintiff's Constitutional rights had been violated.

None of the Eighth Circuit cases cited by Petitioners even involve a motion for summary judgment. Rather, in all of these cases, the Eighth Circuit held it was proper for the court to decide the *Elrod-Branti* question as a matter of law after all of the evidence had been produced at trial. This position in no way contradicts the Third Circuit's holding in this case, for the Third Circuit merely found there are issues of fact to be resolved by the fact-finder before the *Elrod-Branti* question can be answered. The Third Circuit did not hold the jury must decide the *Elrod-Branti* question; it only held the question cannot be answered at this juncture.

I. Petitioners Have Not Cited Any Ninth Circuit Cases In Which The Court Resolved Factual Issues On A Rule 56(c) Motion.

Petitioners claim the Ninth Circuit "sits on the fence" between the view that the *Elrod-Branti* question is a question of law and the view that it is a question of fact. (P. 28). In *DiRuzza v. County of Tehama*, 206 F.3d 1304 (9th Cir. 2000), petitioners correctly note that the Ninth Circuit reversed the trial court's grant of summary judgment in favor of the defendants, finding a genuine issue of material fact existed regarding the duties the plaintiff actually performed. *Id.* at 1311. The Ninth Circuit therefore remanded the case for the trial court to determine whether the plaintiff was a policymaker. *Id.* at 1313.

Petitioners are correct that the Ninth Circuit did not remand the case and instruct that the jury should decide the *Elrod-Branti* question. Nor did the Third Circuit in this case. What both courts held, as did every other court that addressed the issue, is that the *Elrod-Branti* question cannot be answered as a matter of law pursuant to a summary judgment motion when there are material facts in dispute. The Ninth Circuit does not sit on a fence between any opposing views. The Ninth Circuit, like all of the other circuits, follows the requirements of Rule 56(c).

J. Petitioners Have Not Cited Any Tenth Circuit Cases In Which The Court Resolved Factual Issues On A Rule 56(c) Motion.

In *Dickeson v. Quarberg*, 844 F.2d 1435 (10th Cir. 1988), the trial court granted the defendants' motion for summary judgment, finding the defendants had the authority to make new appointments to the plaintiffs' positions. The Tenth Circuit reversed, holding, based on the clear and undisputed duties of the plaintiffs' positions, that the positions were protected by *Elrod-Branti* as a matter of law. *Id.* at 1444. The Tenth Circuit remanded to the fact-finder to determine whether the plaintiffs' political association motivated their discharges. *Id.* at 1445. Again, no factual dispute existed and the court ruled on the *Elrod-Branti* issue as a matter of law.

Similarly, in *Barker v. City of Del City*, 215 F.3d 1134 (10th Cir. 2000), the Tenth Circuit affirmed grant of summary judgment in favor of defendants, agreeing there

was no genuine issue of material fact and the defendants were entitled to judgment as a matter of law. *Id.* at 1138.

Petitioners show nothing more than that the Tenth Circuit does what every other circuit does when the facts are not disputed and the moving party is entitled to judgment as a matter of law.

CONCLUSION

Even if petitioners had not waived the question they present by failing to raise it before the district court or the Court of Appeals panel, the issue is not ripe for adjudication because it would not properly have been before the Court of Appeals on review of a summary judgment record. For any and all reasons set forth above, the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

SAMUEL J. CORDES
(*Counsel of Record*)
CARRIE L. FURLAN
OGG, CORDES, MURPHY & IGNELZI
245 Fort Pitt Boulevard
Pittsburgh, PA 15222
(412) 471-8500

Counsel for Respondent

Dated: April 17, 2002